



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 26, 1995

Ms. Raenell Silcox
Attorney
Resource Protection Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78711-2548

OR95-700

Dear Ms. Silcox:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32124.

The Texas Parks and Wildlife Department (the "department") received two open records requests seeking information about arsenic environmental contamination of Finfeather and Bryan Municipal Lakes by the Pennwalt Corporation Facility also known as Agchem and Elf Atochem in Bryan, Brazos County, Texas. You ask whether the department may withhold the requested information from required public disclosure pursuant to sections 552.101, 552.103, 552.107 and 552.111 of the Government Code. You have submitted for our review copies of the responsive documents.

The department, the Texas Natural Resource Conservation Commission, and the Texas General Land Office, are trustees for the state's natural resources pursuant to federal statutes. In addition to the three state trustees, there are two federal natural resource trustees. As a trustee, the department may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of hazardous materials. *See* Nat. Res. Code § 40.107. You inform us that a natural resource damage claim may only be resolved by settlement or litigation.

You inform us that because (1) state and federal jurisdictions overlap; (2) prohibitions in the governing statutes against "double recovery"; and (3) the difficulty or impossibility of executing an effective restoration project if the damage recovery is divided into small sums which are administered separately by individual agencies,

that the trustees consider the natural resource damage claim to be a single indivisible claim. You state that the current method of operation is for each trustee to have equal input into the development of the damage claim and the eventual expenditure of the recovery. You state that the department is currently evaluating its claim for natural resource damages at the Elf Atochem site. Finally, you contend that the trustees have always considered communications between the technical and legal representatives of the trustee agencies regarding natural resource damage assessment (NRDA) sites to be confidential communications. You argue that if the trustees cannot communicate among themselves and exchange documents, opinions, and data with an assurance of confidentiality, the pursuit of a joint claim will be impossible.

You state that the department considers itself to be in reasonable anticipation of litigation. You inform us that, from the time of discovery of an unauthorized release or discharge until such time as a satisfactory settlement has been reached with the responsible party, a court has made a final disposition of the claim, or the natural resource trustees have officially abandoned their claim in writing that litigation is reasonably anticipated. You contend that many of the requested documents are excepted from required public disclosure by section 552.103(a).

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. We believe that the requested information relates to reasonably anticipated litigation or settlement negotiations with Atochem. We, therefore, conclude that, pursuant to section 552.103(a), the department may withhold the portions of the requested information for which it asserted this exception.

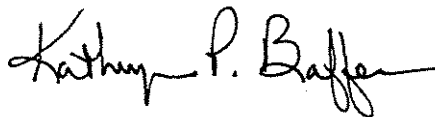
Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once litigation if any occurs has been concluded. Attorney General Opinion MW-575 (1982) ; Open Records Decision No. 350 (1982) at 3.

You contend that the remaining submitted documents, Attachment IV, are excepted from required disclosure by sections 552.107 and 552.111. We note that you do not raise section 552.103 as an exception applicable to the documents submitted to us as Attachment IV. The documents submitted in Attachment IV include personal notes by attorneys made during settlement negotiations and other meetings as well as memos from attorneys representing TPWD as relates to the Atochem site.

Section 552.107(1) protects communications within the attorney-client privilege from disclosure under the Open Records Act. *See* Open Records Decision No. 574 (1990). Portions of the documents may be withheld if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been made or will be made to the client or associated attorneys on the case. *Id.* at 6. We conclude that you may withhold the documents submitted in Attachment IV pursuant to section 552.107 of the Government Code except for the notes taken during the Atochem settlement meeting of September 12, 1991. Regarding the notes from the settlement meeting, we assume that these are notes of what transpired during a meeting attended by all parties to the anticipated litigation. Consequently, there exists no information in these notes that would be within the attorney-client privilege and excepted by section 552.107 of the Government Code. Section 552.111 excepts from required disclosure an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation. Section 552.111 is not applicable to the notes made at the settlement meeting. Since you have urged no applicable exception for the settlement meeting notes, you must release these notes to the requestor.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kathryn P. Baffes". The signature is fluid and cursive, with the first name "Kathryn" being more prominent.

Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/KHG/rho

Ref: ID# 32124

Enclosures: Submitted documents

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